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No. 85- .

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ALLIED BOND AND COLLECTION AGENCY,
Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL
COURT FOR THE COMMONWEALTH
OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

Danielle E. deBenedictis
(Counsel of Record)
Robert S Brintz
Linda J. Kline
Nutter, McClennen & Fish
600 Atlantic Avenue
Boston, MA 02210
(617) 973-9700
Counsel for Appellant
Allied Bond and Collection
Agency

QUESTION PRESENTED

Whether the licensing requirements of Mass. Gen. Laws ch. 93, § 24 and the licensing and record keeping regulations promulgated thereunder, 209 C.M.R. §§ 18.05, 18.08, 18.09, are inconsistent with the negative implications of the commerce clause to the United States Constitution, U.S. Const. Art. I, § 8, cl. 3, because they unduly burden interstate commerce in that they require Allied Bond & Collection Agency and other out-of-state consumer debt collection agencies which conduct debt collection activities in Massachusetts solely through interstate mail and telephone,

to establish an office in Massachusetts, to engage an employee or agent in Massachusetts, to file annual financial statements and to maintain a separate and duplicative system of books and records pertaining to Massachusetts debtors.

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ON APPEAL FROM THE SUPREME JUDICIAL
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JURISDICTIONAL STATEMENT

Allied Bond & Collection Agency ("Allied"), the appellant, appeals from the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, which held that the licensing requirements of Mass. Gen. Laws ch. 93, § 24, and the regulations

promulgated thereunder are not unconstitutional and may be applied to Allied. Allied asserts that this statutory scheme imposes an impermissible burden on Allied's interstate business inconsistent with the negative implications of the commerce clause of the United States Constitution, U.S. Const. Art. I, § 8, cl. 3.

OPINION BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 394 Mass. 608, 476 N.E.2d 955. A copy of the opinion is appended.

JURISDICTION

The opinion and order of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on April 18, 1985. See pp.1a, 12a infra. On May 31, 1985 appellant's petition for rehearing was denied. See p.13a, infra.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The commerce clause of article, sec. 8, of the Constitution of the United States provides in pertinent part:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .

State statutes and regulations:[1/] Mass. Gen. Laws ch. 93, § 24; 209 C.M.R. §§ 18.05, 18.08, 18.09.

STATEMENT OF THE CASE

Appellant, Allied Bond & Collection Agency ("Allied") is a sole proprietorship, which, since 1960, has been engaged in the collection of retail accounts from consumer debtors throughout the fifty states and in several United Stated territories and

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1/ In compliance with Sup. Ct. R. 15.1(f), the verbatim text of these provisions are set forth in the appendix. See pp 16a-20a, infra.

foreign countries. Allied collects debts on behalf of corporate clients. It employs approximately one hundred twenty-two debt collection employees. All of its debt collection business is conducted from its only office in Trevose, Pennsylvania. It does not have a debt collection license, bond, or any type of permit in any state, territory or foreign county other than in the city of Philadelphia, where Allied has obtained a mercantile license, and in Connecticut.

Allied's contacts with debtors in Massachusetts are carried out exclusively through interstate mail and interstate telephone from its office in Pennsylvania. Allied has no employees or agents present and doing business in Massachusetts. It has

never maintained an office, records, mailing address, post office box, telephone, telephone listing, or bank account in Massachusetts. In addition, Allied does not solicit business in Massachusetts, and none of Allied's corporate clients has its headquarters in Massachusetts. In sum, Allied is a foreign collection agency which contacts Massachusetts debtors on behalf of foreign creditors solely through interstate mail and interstate telephone from its only office in Pennsylvania.

Allied's business in Massachusetts represents only a small percentage of Allied's overall debt collection business. For the year 1979, Allied's business in Massachusetts amounted to 2.9% of its total business (attempted

dollars to collect) and 2% of the total number of accounts it attempted to collect. Its net profit after taxes for that year, resulting from collection of debts from Massachusetts debtors, was approximately $4,086.

Allied's nationwide debt collection activities do not go unregulated. Along with being regulated by the Pennsylvania Bureau of Consumer Affairs, Allied is also regulated by the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692o, which sets forth standards for all consumer debt collection agencies. The FDCPA also provides an enforcement scheme, administered by the Federal Trade Commission, that is available to debtor complainants, including Massachusetts citizens.

Allied enforces strict compliance with the standards set forth in the FDCPA and it has instituted rigid self-policing methods to ensure such compliance. For example, Allied requires an intensive six-week training program for its newly hired collection employees to ensure that they have full knowledge and understanding of the FDCPA. In addition to training its employees, Allied monitors collection calls to ascertain whether employees are using improper collection tactics. The use of improper tactics constitutes grounds for disciplinary action, including dismissal.

Allied also cooperates fully with state and federal agencies to investigate and take appropriate

action with respect to any complaints charging collection misconduct on the part of its employees. No state or federal agency has ever sought to bring formal proceedings against Allied arising out of any instance of alleged employee misconduct. There is no allegation by the Commonwealth in this case that Allied has violated any standard of conduct governing the manner in which it conducts its business in Massachusetts.

In addition to federal regulation under the FDCPA, at least twenty-seven states regulate collection agencies. If Allied were required to comply with each of the regulating states' regulations, Allied could not continue to offer fifty-state service to its national corporate clients. The

primary reason for Allied's competitiveness in the collection industry and its ability to attract large corporate clients doing business nationally is the economic efficiency achieved by (1) collecting debts in all fifty states, (2) using a single office, and (3) using a simplified unitary, computerized record keeping system which includes debtor accounts in all states.

In order to continue to comply with each state's regulations, Allied would be required to open, staff, and otherwise run approximately fifteen additional offices; post hundreds of thousands of dollars in bonds; establish trust accounts for collected funds in at least ten states; establish and maintain separate record

keeping systems for each of the regulatory states in order to comply with their non-uniform requirements; and prepare and provide numerous periodic reports, accountings, reconciliations, summaries, and other required records particularized to the diverse regulatory requirements of each of the regulatory states. The costs to Allied of such compliance would be prohibitive. Allied would lose its present character as a full-service interstate collection agency and the economic efficiencies attendant to its present method of doing business. Under these circumstances Allied would be forced to cease doing business in many states, would be competitively disadvantaged, and would undoubtedly lose many of its national corporate clients.

On March 23, 1977, the Commonwealth of Massachusetts brought an action in the Massachusetts Superior court pursuant to Mass. Gen. Laws ch. 93A, seeking to enjoin Allied from engaging in the collection of consumer debts from Massachusetts debtors until Allied has qualified to do business here under Mass. Gen. Laws ch. 93, § 24 and the licensing regulations promulgated thereunder. Massachusetts Gen. Laws ch. 93, § 24 requires that all debt collection agencies seeking to do business in the Commonwealth obtain a license from the Commissioner of Banking. The licensing regulations add the further requirements that a consumer debt collection agency seeking to do business in the Commonwealth (1) establish an office within the

Commonwealth, (2) maintain books and records here, (3) file with the Commissioner of Banking ("the Commissioner") a schedule of days and hours the office will be open, (4) post a bond in the amount of $10,000, (5) have an employee or agent available to be present at the office in the event of unannounced regulatory inspections, and (6) file an annual financial statement with the Commissioner.

The sole purpose of the local office is to permit unannounced regulatory inspections of records. The only records required to be kept in the office are those disclosing "debts and amounts of payments from debtors and remittance made to debtors." 209 C.M.R. § 18.09. The

agency may continue to collect debts from its out-of-state location.

In defense, Allied argued that this licensing scheme is unconstitutional in that it unduly burdens its interstate business and that it discriminates against interstate collection agencies in favor of local agencies. The Commonwealth maintained that the regulation of debt collection agencies falls within the legitimate exercise of state power under the commerce clause of the United States Constitution, and that the Massachusetts licensing scheme affects evenhandedly all debt collection agencies doing business here.

After the suit was filed, Allied sought to remove the case to the United States District Court for the District of Massachusetts. That petition was denied, and the case was remanded to the superior court. On September 15, 1983, the Commonwealth moved for summary judgment and thereafter Allied filed a cross motion for summary judgment. On May 29, 1984, the parties filed a Joint Motion For Report Of Case To The Massachusetts Appeals Court, together with a Statement Of Agreed Facts and affidavits.[2/] That motion was allowed on May 30, 1984.

2/ The Statement of Agreed Facts and affidavits forms the basis of the factual summary presented by Allied immediately hereinabove.

Subsequently, the parties jointly filed an Application For Direct Appellate Review of the case to the Massachusetts Supreme Judicial Court, and that petition was granted on September 27, 1984.

On April 18, 1985, the Supreme Judicial Court issued its opinion. In that opinion, however, the court overlooked certain points of law and fact and ignored, misconstrued or misapplied certain decisions of this Court. On May 31, 1985, the Supreme Judicial Court denied Allied's petition for rehearing, resulting in the instant appeal.

On August 12, 1985, The Supreme Judicial Court stayed enforcement of its judgment against Allied during the

pendency of this appeal on the condition that Allied apply for a Massachusetts license and post a bond on or before August 29, 1985. (without having to establish a local office, alter its record keeping system or engage a local employee)

THE QUESTION IS SUBSTANTIAL

This appeal raises complex issues of constitutional interpretation with far-reaching implications. The Massachusetts Supreme Judicial Court has concluded that consistent with the commerce clause of the Constitution of the United States, Massachusetts may require Allied, (a Pennsylvania entity which collects debts from Massachusetts debtors solely through the channels of interstate commerce

from its office in Pennsylvania), to, inter alia, obtain a license to do business in Massachusetts and to establish a local office and engage an employee here.

In its brief before the Supreme Judicial Court, Allied presented four separate arguments why the challenged regulations violate the commerce clause:

First, Allied argued that inasmuch as it is engaged wholly in interstate commerce in Massachusetts, the licensing scheme constitutes an unconstitutional bar to Allied's right to unimpeded access into the Massachusetts debt collection market. Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974); Eli Lilly & Co. v.

Sav-On-Drugs, Inc., 366 U.S. 276, 278 (1961); International Textbook Co. v. Pigg, 217 U.S. 91 (1910).

Second, Allied argued that the licensing scheme is unconstitutional because it does not regulate evenhandedly to effectuate its purpose, as it improperly requires out-of-state debt collection agencies to conduct operations in Massachusetts which can be performed more efficiently elsewhere. See Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970). Moreover, in practical effect, the licensing scheme discriminates in favor of local collection agencies which are not required to establish a second unwanted office, to hire additional local employees, or to duplicate records created elsewhere.

Third, Allied argued that the licensing scheme is unconstitutional inasmuch as the burden imposed on interstate commerce is clearly excessive in relation to its putative benefits and because there are less burdensome alternative means by which the Commonwealth can achieve its purposes. Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36 (1980); Pike, 397 U.S. at 142.

Fourth, Allied argued that the cumulative impact of the various states' statutes regulating debt collection constitutes an impermissible burden on interstate commerce. See Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978); Silver v. Woolf, 694 F.2d 8, 14 (2d. Cir. 1982), cert. denied, 103 S. Ct. 1525 (1983).

In its opinion the Supreme Judicial Court addressed each of these theories under the following corresponding headings: (1) "per se invalidity," (2) "discriminatory effect," (3) "the balancing test," and (4) "cumulative burden." In rejecting each of these arguments, the state court's decision distorts certain of Allied's arguments and seriously and substantially misinterprets or ignores the extensive body of law generated by this Court explicating the negative implications of the commerce clause. Allied now appeals to this Court to correct these misinterpretations. The basis for this appeal as to each of the four theories is presented in turn below.

Per Se Invalidity. The state court rejected Allied's argument based upon Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 37, Eli Lilly & Co. v. Sav-On-Drugs. Inc., 366 U.S. 276, 278, and International Textbook Co. v. Pigg, 217 U.S. 91, that an out-of-state entity engaged soley in interstate commerce in another state is per se not subject to that state's licensing requirements. Allenberg and Eli Lilly did not involve specific licensing schemes , but rather held that a state cannot require an out-of-state business to obtain a certificate of authority to do business in the state if it's business in the state is wholly in interstate commerce. In the only post-Allenberg case considering the applicability of that line of cases to a specific

licensing scheme, Silver v. Woolf, 694 F.2d 8 (rejecting Allied's challenge to the Connecticut licensing scheme, which, significantly, unlike the Massachusetts scheme, has no local office requirement), the Second Circuit conceded that the "precise impact of Allenberg" on the issue in question "is not self evident." Id. at 11.

In Eli Lilly, in which the majority of the Court found that Eli Lilly was engaged in local business in New Jersey and thus held that Eli Lilly could be required to obtain a certificate of authority to do business, Justice Harlan, concurring, declared:

> Because I am of the view that Eli Lilly has engaged in "local

> business" in New Jersey, there is no need now to consider whether a wholly interstate business enjoys the same degree of immunity from state licensing provisions when the state requirement is regulatory as it does when the state requirement is purely a tax measure.

366 U.S. at 284 n.3 (emphasis supplied). This question was apparently answered in the affirmative in Allenberg, in which the Court held:

> [A]ppellant's contacts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a state seeks to require a foreign corporation to qualify to do business.

419 U.S. at 33. The Allenberg Court distinguishes Eli Lilly as follows:

> There the Court found that the foreign corporation had an office and salesmen in New Jersey selling drugs intrastate. Since it was engaged in an intrastate business it could be required to obtain a license even though it also did an interstate business.

Id. at 32.[3/]

The state court purported to distinguish Allenberg Cotton and Eli Lilly, relying on 15 U.S.C. § 1692n of the Fair Debt Collection Practices Act as an express congressional authorization for the states to license debt collection agencies, even if they conduct a wholly interstate business.

However, this section, which is reproduced in the margin,[4/] does not

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3/ Ironically, Massachusetts is attempting to require Allied to establish the very type of contacts in Massachusetts which could arguably alter its purely interstate character to include localized business.

4/ Section 1692n provides: This subchapter does not annul, alter, or effect, or exempt any person subject to the provisions of this subchapter

(Footnote Continued on Next Page)

purport to and in fact expressly negates any inference that it gives the states any power they did not possess prior to enactment of the statute. The obvious purpose of §1692n is to preserve existing state regulation and to permit further regulation so long as it is not inconsistent with the Act and so long as it operates within the pre-existing limitations of the commerce clause.

4/ (Footnote Continued from Previous Page)

from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

Cf. Lewis v. BT Investment Managers, Inc., 447 U.S. at 49 (so construing a similar clause in the Bank Holding Company Act of 1956).

The state court further purported to distinguish this case from Allenberg, incredibly citing Silver v. Wolf for the proposition that

> the burden on commerce is significantly less and the state's interest in regulation of the activity involved is significantly greater in the case before us than in cases involving closing the door to litigation of foreign corporations.

394 Mass. at 612-13. Even assuming that that proposition were correct in Silver v. Wolf, that case involved a bare licensing requirement. It involved none of the additional burdensome requirements found in the

Massachusetts scheme. Moreover, it is, at best, difficult to distinguish between the burden imposed on commerce by the requirement to obtain a general certificate of authority to do business and that imposed by the requirement to obtain a license. Indeed, Allenberg and Eli Lilly use the terms "license" and "certificate of authority to do business" interchangeably.[5/]

5/ In any event, the above-quoted language from the state court's opinion indicates that it was engaging in interest balancing. Such an approach, however, is unwarranted under Allenberg and Eli Lilly, which establish a per se test requiring only a determination of whether an entity is engaged solely in interstate commerce in a particular state.

In International Textbook Co. v. Pigg, 217 U.S. 91, the Supreme Court held that a Kansas statute which required the filing of a financial statement as a prerequisite to the doing of business within Kansas by a foreign corporation, unduly burdened interstate commerce as applied to a Pennsylvania "correspondence school."[6/] The Court noted that the Kansas statute did not require a "license" to do business in Kansas. 217 U.S. at 110-11. However, the Court stated that, because Kansas was threatening foreign corporations into

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6/ Significantly, the Massachusetts licensing scheme requires Allied to file a financial statement as a prerequisite to obtaining a license. Relatively speaking, this is one of the less burdensome requirements of the Massachusetts scheme.

compliance with its statutory registration requirements:

> [t]he effect of such requirements is practically the same as if a formal license was required as a condition precedent to the right to do such business. In either case it imposes a condition upon a corporation of another State seeking to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce. The State cannot thus burden interstate commerce.

Id. (emphasis supplied). In the instant action, the state court avoided the rule of International Textbook by ignoring it. The court's opinion fails to distinguish or address this case in any way.

This Court's opinions establish that Massachusetts may not impose a

licensing requirement on Allied as a prerequisite to permitting Allied to conduct wholly interstate business in Massachusetts. Certainly, the "precise impact of Allenberg" and the continued vitality of International Textbook Co. v. Pigg, which has never been overruled, raise a substantial issue on appeal.

Discriminatory Effect. The Supreme Court has never upheld a state regulation that requires an out-of-state entity to conduct operations in the home state in the face of a commerce clause challenge. Rather, the Supreme Court has established a rule of virtual per se unconstitutionality of such regulations. In Pike v. Bruce Church, Inc., 397 U.S. at 145 the Court declared:

> The Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where a State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.

The state court's opinion correctly recognizes the rule established in Pike, stating that if any of Allied's "debt collection activities" were required to be carried on in the Commonwealth, "any such requirement would probably be an undue burden on interstate commerce." 394 Mass. at 614. The court, however, purports to avoid this rule by asserting the following untenable postulation: "None of Allied's debt collection activities must be carried on in [Massachusetts]. . . . Thus no

business operations that could be more efficiently performed in Pennsylvania are required to be performed in Massachusetts." Id. (emphasis supplied). For purposes of commerce clause analysis, however, no legally significant distinction can be drawn between debt collection activities per se and the business activities which the statute and regulations in question require Allied to carry on in the Commonwealth. The state court's assertion that opening a second costly unwanted and duplicate office, hiring an additional unwanted employee, changing its record keeping system from a unitary nationwide system to include a separate Massachusetts system and creating and maintaining here a duplicate unneeded set of Massachusetts records, is not

"business" that could not be, and in fact is already being performed more efficiently in Pennsylvania, flies in the face of the facts, reason and well established commerce clause doctrine.

The state court further avoids the rule of Pike by concluding that "[t]he local office requirement is imposed [1] only to the extent necessary to permit the commissioner to carry out his regulatory obligations and [2] visits its effects equally upon interstate and local business." Id. at 615.

The state court apparently bases its second assertion, that the regulation "visits its effects equally upon interstate and local business," on the facial neutrality of the

challenged regulation. This ignores this Court's pronouncement that even when the state asserts legitimate and important regulatory programs in support of challenged regulation, "[t]he principal focus of inquiry must be on the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." Lewis v. BT Investment Managers, Inc., 447 U.S. at 36-37.

Allied has been collecting debts from Massachusetts debtors since 1960 from its single office in Pennsylvania. It has created and maintained its records with respect to its Massachusetts activities in that one office and has employed personnel to conduct Massachusetts collection

activities from that office. The Massachusetts local office, local employee and local record keeping requirements clearly require Allied to duplicate business operations which it has been conducting in Pennsylvania. Contrary to the court's conclusion quoted above, inasmuch as the regulatory scheme does not, in practical effect, similarly require local collection agencies to duplicate business operations being performed elsewhere, the regulatory scheme does not visit its effect equally upon interstate and local business.

Moreover even if the first part of the state court's proposition, that the "local office requirement is imposed only to the extent necessary to permit the commissioner to carry

out his regulatory obligations," 394 Mass. at 615 (emphasis supplied), were true, these particular means to achieve even legitimate regulatory ends would nevertheless offend the values of unrestricted commerce protected by the Constitution. See, e.g., Toomer v. Witsell, 334 U.S. 385 (1948), in which the Court held unconstitutional a statute requiring shrimpers in South Carolina waters to unload, pack, and stamp their catch with a tax stamp locally, before transporting it to other states. Upon observing that inasmuch as the shrimpers maintained their own docking, warehousing, refrigeration and packing facilities, elsewhere,

this would increase their costs, the Court declared that[7/]

> "the importance of having [interstate] commerce . . . unimpeded by local barriers persuades us that State restrictions inimical to the Commerce Clause should not be approved simply because they facilitate in some measure enforcement of a valid tax."

Id. at 406; see also Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (upholding a challenge to a statute requiring local operations despite valid health and safety inspection purposes).

7/ This Court also observed that "an inevitable concomitant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fisherman, is to divert to South Carolina employment and business which might otherwise go to Georgia." 334 U.S. at 403. This is also true of Massachusetts' local office requirement.

The state court failed to distinguish, address, or even cite to Dean Milk and Toomer. Inasmuch as the case at bar has not been and cannot be meaningfully distinguished from these cases and Pike v. Bruce Church, the state court's decision should be reversed.

The Balancing Test. In undertaking the balancing test of Pike v. Bruce Church, the state court asserts erroneously:

> The test is whether interstate commerce is burdened generally, and not whether the degree of burden on a specific plaintiff is undue. See Exxon Corp. v. Governor of Md., 437 U.S. 117, 127-128 (1978). The assertion that Allied could not economically maintain a Massachusetts office is, therefore, not sufficient, even if true, to prove an undue burden on interstate commerce.

394 Mass. at 615. The state court's assertion is apparently based upon language taken out of context from the Exxon Corp. case in which the Supreme Court stated: "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." 437 U.S. at 127-28. However, Exxon Corp. does not stand for the broad proposition for which the state court cites it. As stated by this Court in a decision rendered after Exxon Corp., the result in Exxon Corp. and the above dictum was based upon a determination that the statute in question did "not discriminate against interstate [business] in favor of locally based competitors because, as a matter of fact, there were no such local [competitors] to be

favored." Lewis v. BT Investment Managers, Inc., 447 U.S. at 41 (explaining and distinguishing Exxon Corp.). In Lewis this Court further stated: "The absence of a similar discrimination between interstate and local producer refiners was a most critical factor in Exxon." Id. at 42. In Exxon Corp. the Court did conclude, however, that the regulation placed "a disparate burden on some interstate competitors" and might result in a "shifting of business from one part of the interstate market to another." Id. at 41. It was this conclusion that prompted the Court to observe that the commerce clause does not protect individual firms from regulation. That is, in the absence of a discriminatory effect in favor of local commerce, the commerce clause

does not protect particular interstate firms.

In the case at bar, however, unlike Exxon Corp., the alleged discrimination is between local and interstate commerce. In such a case the proper mode of analysis is to focus on the particular burden placed on the party or parties challenging the offending regulation, not on the interstate market generally. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137; Dean Milk Co. v. Madison, 340 U.S. 349; Toomer v. Witsell, 334 U.S. 385; and cases too numerous to cite. Thus, the state court opinion ignores the mode of analysis of these cases and misapprehends the meaning of Exxon.

Even had the state court employed the proper mode of analysis focusing on the burden placed on Allied, its opinion indicates that it would have applied that analysis improperly. The state court declared that "[e]ven if Allied's own circumstances were relevant, the record does not sufficiently show that Allied could not afford the costs of licensing and of the limited office it must maintain." 394 Mass. at 616 (emphasis added). The proper inquiry, however, is to balance Allied's burden against the benefits to be derived from the challenged regulation; not to determine whether Allied could conceivably meet the requirements.

Furthermore, the state court misapprehends the nature of the burden

imposed on Allied by the regulatory scheme, choosing instead to point to the facile proposition that the burden is insubstantial since "[w]e know from the record that twenty-seven out-of-State collection agencies are licensed by and maintain local offices in Massachusetts." Id. at 615. Resort to such reasoning can only be characterized as disingenuous, given that the record says nothing about the number of collection agencies that have chosen to forego operations in Massachusetts due to their inability to meet the regulatory burdens. Nor does the record establish the character of the twenty-seven licensed agencies (e.g., whether they are large national agencies which choose to have many regional or local state offices).

Moreover, the court apparently ignores in this context undisputed factual evidence which compels the conclusion that Allied is substantially burdened. Allied cannot segregate and duplicate its records with respect to Massachusetts creditors, maintain office space in Massachusetts and employ an employee or agent in Massachusetts and continue to conduct profitably its collection activities in Massachusetts. At the very least, performance of these activities imposes a cognizable burden which should be balanced against the state's interests.[8/]

8/ In the year of record Allied's total profit from its Massachusetts activities was only approximately $4,000. Moreover, Allied does not customarily keep records on a state-by-state basis, and where state-by-state information can be

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The state court also improperly assessed the Commonwealth's interest in conducting unannounced inspections. The court failed to undertake any meaningful analysis to determine whether and to what degree the challenged regulatory scheme actually promotes the asserted local interest, which this Court's opinions indicate is a crucial consideration. See, e.g., Raymond Motor

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8/ (Footnote Continued from Previous Page)

obtained, the process is time consuming and expensive. Finally, the primary reasons for Allied's competitiveness in the collection industry and its ability to attract its large corporate clients doing business nationally is the economic efficiency achieved by collecting debts in all fifty states from a single office and using a simplified unitary computerized record keeping system which includes debtor accounts in all states.

Transportation, Inc. v. Rice, 434 U.S. 429; Dean Milk, 340 U.S. 349. Nor did the state court determine whether less burdensome alternatives exist to achieve that interest. See Pike v. Bruce Church, Inc., 397 U.S. at 142. The court erroneously states that:

> Allied makes no argument that a procedure of some sort for examining books and records is unreasonable. There is no demonstrated alternative method of achieving the Commissioner's inspection goals.

However, Allied does argue that the regulatory procedure is unreasonable.[9/] In its brief Allied

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9/ Significantly, this Court has held that "[w]hen discrimination against Commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statue and the unavailability of nondiscriminatory alternatives. . ."

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argued:

> The only ostensible purpose for these particular records and thus inspections thereof, is to ascertain whether the collection agency has complied with the requirement to remit payments due creditors within the required time. This marginal benefit hardly justifies the burden placed on a collection agency of opening, maintaining and staffing an otherwise unnecessary and unwanted office in Massachusetts (particularly in view of the fact that under the regulation the creditor can waive the time requirement). (Allied's Brief at 35-36 (original emphasis)).

Furthermore, Allied did present several alternative methods for

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9/ (Footnote Continued from Previous Page)

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 353 (1977). Having failed to recognized the obvious discriminatory effect of the Massachusetts Scheme, the state court erroneously failed to shift the burden of proof from Allied to the Commonwealth.

achieving the Commissioner's goals. For example, Allied argued that the Fair Debt Collection Practices Act (FDCPA), which regulates the entire consumer debt collection industry, including Allied, provides, even in the absence of regulation by the Commonwealth, an adequate yet simple, administrative enforcement mechanism for Massachusetts citizens aggrieved by debt collection practices. (Allied's Brief at 40-41). The Massachusetts Banking Commissioner's goals of preventing collection agency fraud with respect to payments by debtors are and have been adequately achieved through federal implementation of the FDCPA.[10/]

10/ Massachusetts regulations are not significantly more strict than federal regulations, they are simply procedurally more burdensome.

Allied further proposed that rather than maintain books and records in Massachusetts, the Commonwealth could conduct, at Allied's expense, inspections at Allied's Pennsylvania office or could require Allied to send records directly to the Massachusetts Commissioner of Banking. The state court rejected these alternatives, pointing instead to the Commissioner's "opinion" in his affidavit that "it would not be feasible to send examiners throughout the country." This reasoning is contrary to case law which expressly holds that imposing an inspection fee for an out-of-state examination is an adequate alternative to a local inspection requirement. See, e.g., Dean Milk Co. v. Madison, 340 U.S. at 354-55.

Furthermore, the Commissioner's purported justification of the need for unannounced inspections is both wholly unsupported on the record and, on its face, simply absurd. The Commonwealth argues that examination of books and records submitted by a licensee on request is not practical from an auditing standpoint because a debt collector could defraud a debtor by failing to send to the Commissioner all of the requested payment records. However, payments by debtors and remittances to creditors would be easily verifiable by the debtor and creditor, respectively. Moreover, even under the office requirement, the out-of-state collector would be required to send the relevant records to the local office; and the collection agency could easily decline

to send records showing wrongdoing to the Massachusetts office. Thus, the benefits to be derived from the Massachusetts office are wholly illusory.

In addition, the collection agency is required to post a bond, ostensibly to protect the debtor from the collection agency's missappropriation of debtors' payments. Thus, the debtor is already secure from the type of fraud the office requirement is purportedly designed to prevent. Clearly, posting a bond is less burdensome than opening a local office. The state court's opinion ignores these facts.

Cumulative Burden. In rejecting Allied's cumulative burden argument,

the Court once again critically misapprehends the meaning of the Exxon Corp. case, stating incorrectly that Allied must show "that the consumer debt collection industry as a whole is unduly burdened by a multitude of State regulations." 394 Mass. at 617.

Further, the state court incredibly cites Silver v. Woolf, 694 F.2d 8, for the proposition that "this record does not show that the aggregate effect of State regulation is prohibitive as to interstate debt collection agencies." 394 Mass. at 617. In Silver, however, the Second Circuit properly rejected Allied's cumulative impact argument because Allied had not submitted evidence supporting this argument.

The uncontradicted record in this case establishes that if Allied were required to comply with each of the regulating states regulations pertaining to debt collection, in order to continue to offer fifty-state service to its national corporate clients, it would be required to open, staff and otherwise run approximately 15 additional offices; post hundreds of thousands of dollars in bonds; establish trust accounts for collected funds in at least ten states; establish and maintain separate record keeping systems for each of the regulating states in order to comply with their non-uniform requirements; and, prepare and provide numerous periodic reports, accountings, reconciliations, summaries, and other required records particularized to the

diverse regulatory requirements of each of the regulating states. The cost to Allied of such compliance would be prohibitive. In short, Allied would lose its present character as a full-service intrastate collection agency and the economic efficiencies attendant to its present method of doing business. Under these circumstances, Allied would be forced to cease doing business in many states, would be competitively disadvantaged, and would undoubtedly lose many of its national corporate clients.

These undisputed facts are clearly sufficient to establish a cumulative burden in violation of the commerce clause.

CONCLUSION

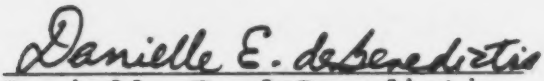
The foregoing statement highlights numerous analytical errors made by the state court in its determination of the merits of Allied's commerce clause challenge to the Massachusetts licensing scheme. If permitted to stand, the state court's opinion can only precipitate serious financial repercussions for Allied and much of the interstate debt collection industry. In addition it will create an atmosphere of uncertainty on the part of numerous interstate business interests regarding the permissible scope of State licensing and regulation of interstate businesses. The economic efficiencies achieved by

use of interstate mail and telephone service coupled with computerized record keeping techniques enable even very small entities to conduct business on a national scale from single locations. This mode of doing business will be essentially destroyed if each of the individual states can require such entities to obtain licenses, to engage local employees and to establish local depositories for the maintenance of state-by-state records.

For each of the foregoing reasons Allied Bond & Collection Agency urges

this Court to note probable jurisdiction of this appeal.

Respectfully submitted,



Danielle E. deBenedictis
(Counsel of Record)
Robert S Brintz
Linda J. Kline
Nutter, McClennen & Fish
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
(617) 973-9700
Counsel for Appellant

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COMMONWEALTH VS. ALLIED BOND AND COLLECTION AGENCY

Suffolk, February 4, 1985 - April 18, 1985

Present: Hennessey, C.J., Wilkins, Abrams, Nolan & Lynch, JJ

Wilkins, J. We are presented with the question whether the Commonwealth, consistent with the commerce clause of the Constitution of the United States (art. I, § 8, cl. 3), may require an out-of-State consumer debt collection agency, conducting its business solely by interstate mail and telephone, to obtain a license under G. L. c. 93, § 24, and to maintain an office within the Commonwealth pursuant to a regulation of the Commissioner of Banks. 209 Code Mass. Regs. § 18.05 (1980). We conclude that the commerce clause does not bar application of

those requirements to the defendant collection agency.

The defendant Allied Bond and Collection Agency (Allied) is a sole proprietorship, owned by a Pennsylvania resident, having its only office in Trevose, Pennsylvania. Allied has never sought a Massachusetts license nor has it ever had an office in Massachusetts. It does business as a collection agency, in all fifty States and in several United States territories and foreign countries, on behalf of corporate clients. All Allied's contacts with Massachusetts debtors are carried on exclusively through interstate mail and telephone from its Pennsylvania

office. No Allied employee has been sent to this State for any purpose. Allied, as well as the entire consumer debt collection industry, is regulated by the Federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (1982). More than half of the debts that Allied has sought to collect from Massachusetts residents were incurred in this State. Most of the debts collected from Massachusetts debtors were consumer debts. In 1979, Allied attempted to collect more than $1,000,000 in debts from approximately 3,560 Massachusetts debtors. It succeeded in 1979 in collecting approximately $200,000 from 633 such debtors. In that year, Allied earned as net income after taxes

approximately $4,000 from these collection activities. The Massachusetts portion of Allied's activities represented between 2% and 3% of its total business. All Allied's records are kept at its Pennsylvania office. It does not customarily keep records on a State by State basis. Of the 167 collection agencies licensed in Massachusetts, twenty-seven have home offices outside the State. Each of the out-of-State agencies maintains a Massachusetts office.

In this action, the Commonwealth, through its Attorney General, seeks to require Allied to obtain from the Commissioner of Banks (commissioner)

"a license to carry on" its business as a collection agency as required by G. L. c. 93, § 24. In addition, the Commonwealth seeks to enforce the requirement of 209 Code Mass. Regs. § 18.05 that Allied maintain an office in the Commonwealth.[1/] Pursuant to

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1/ 209 Code Mass. Regs. § 18.05 provides:

"A collection agency shall not share quarters or office space with an attorney actively engaged in the practice of law, constable, private detective, regular or special police officer or any other law enforcement officer. A collection agency engaged mainly or preponderantly in the collection of retail accounts against consumer debtors shall maintain an office in the Commonwealth. No change in the location of such office in Massachusetts shall take place without written approval of the Commissioner, but such approval shall be deemed granted if no objection is made by the Commissioner within 30 days after written notification of intended

(Footnote Continued on Next Page)

G. L. c. 93, § 24C, the commissioner may investigate collection records of

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change of location of office. Where no office of a licensee is required to be maintained in Massachusetts, if there is any change in the location of that licensee's office outside the Commonwealth, notice thereof shall be given to the Commissioner forthwith.

"A collection agency engaged mainly or preponderantly in the collecting of retail accounts against consumer debtors shall file with the Commissioner a schedule of days and hours the office will be open. Any change in such schedule shall be reported to the Commissioner at least 5 days before such change shall become effective."

Additionally, 209 Code Mass. Regs. § 18.09, concerning books and records, provides in part:

"The Commissioner shall require the collection agency to keep books and records, and upon reasonable notice to the collection agency to produce such records, as will enable the Commissioner to determine whether

(Footnote Continued on Next Page)

a licensee, and a licensee must provide the commissioner free access to its books and records relating to the collection of debts.

A judge of the Superior Court reported the case to the Appeals Court on the parties' cross-motions for summary judgment, accompanied by a statement of certain agreed facts and affidavits. We allowed the parties'

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the provisions of law and regulations are being compiled with. However, a collection agency engaged mainly or preponderantly in the collection of retail accounts against consumer debtors shall maintain on the licensed premises such books and records, or copies thereof, as will disclose debts and amounts of payments from debtors and remittances made to creditors."

joint application for direct appellate review. Allied presents a series of arguments in the alternative that the Commonwealth's licensing and local office requirements impermissibly burden interstate commerce. We reject each of them.

1. Per Se Invalidity. Allied first argues that, because its business is conducted solely in interstate commerce, the commerce clause forbids the State from requiring it to obtain a license and to maintain an office in Massachusetts. It claims that the State's attempted regulation is per se invalid, relying on cases involving defendants' unsuccessful claims that

actions against them were barred because the plaintiffs did not obtain or file necessary certificates to do business in the forum State. See, e.g., Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974); Goodwin Bros. Leasing, Inv. v. Nousis, 373 Mass. 169 (1977). In such cases, the "door closing" State statutes were held to be an undue burden on interstate commerce because of the interstate character of the transactions involved.

Although the principle of the Allenberg case has been applied subsequently in similar cases (see Diversacon Indus., Inc. v. National Bank of Commerce, 629 F.2d 1030, 1033-1034 [5th Cir. 1980]; Uncle

Ben's, Inc. v. Crowell, 482 F. Supp. 1149, 1154-1155 [E.D. Ark. 1980]), the fact that an enterprise's activity is exclusively in interstate commerce does not bar State regulation in all circumstances. For example, in a series of Federal cases in which an exclusively interstate mail order seller challenged the application to it of State limitations on maximum credit charges in consumer credit transactions, every court that considered the matter held that the commerce clause did not forbid the application of local law. See Aldens, Inc. v. Miller, 466 F. Supp. 379, 382-383 (S.D. Iowa), aff'd, 610 F.2d 538 (8th Cir. 1979), cert. denied, 446 U.S. 919 (1980); Aldens, Inc. v. Ryan,

571 F.2d 1159, 1162 (10th Cir.), cert. denied, 439 U.S. 860 (1978); Aldens, Inc. v. La Follette, 552 F.2d 745, 752-753 (7th Cir.), cert. denied, 434 U.S. 880 (1977); Aldens, Inc. v. Packel, 524 F.2d 38, 49-50 (3d Cir. 1975), cert. denied, 425 U.S. 943 (1976).

Allied itself has unsuccessfully challenged the right of Connecticut to require it to obtain a license as a consumer collection agency. Silver v. Woolf, 538 F. Supp. 881 (D. Conn.), aff'd, 694 F.2d 8 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983).[2/]

2/ The action was brought in the name of Herbert T. Silver d/b/a Allied Bond and Collection Agency.

Before the Court of Appeals, Allied relied on per se argument challenging Connecticut's power to regulate interstate commerce but did not, as here, alternatively argue that the State's licensing requirement itself imposed an onerous burden in relation to any reasonable purpose the State may have. Silver v. Woolf, 694 F.2d at 11-13. The Court of Appeals for the Second Circuit distinguished the Allenberg case because of significantly different contacts between the interstate business and the State in the two situations and further because Congress has indicated the desirability of State regulation of debt collection agencies but has

not similarly spoken concerning limitations on lawsuits brought by interstate businesses. Id.

Where Congress has not legislated in the field and the circumstances do not require a uniform national rule, the question whether the burden on interstate commerce is undue turns on the effect of the State regulation on interstate trade in relation to the justification asserted by the State in support of its regulation. See Aldens, Inc. v. La Follette, supra at 752; Aldens, Inc. v. Packel, supra at 45-46. A regulation such as a "door closing" statute may be deemed per se undue as to a purely interstate trader "because of a pernicious effect on

interstate trade without a correspondingly high state justification." Aldens, Inc. v. La Follette, supra at 752. Congress has not explicitly legislated concerning the scope of State regulation of collection agencies, but it has concluded that no uniform national law is needed, acknowledging the right of a State to impose stricter regulations concerning such agencies than are imposed by Federal law. 15 U.S.C. § 1692n (1982).[3/] This Congressional

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3/ This section of the Fair Debt Collection Practices Act. 15 U.S.C. §§ 1692-1692o (1982), provides:

"This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt

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action alone warrants distinguishing the "door closing" cases on which Allied relies. See Silver v. Woolf, 694 F.2d at 13; Aldens, Inc. v. Packel, supra at 50. Moreover, the burden on commerce is significantly less and the State's interest in regulation of the activity involved is significantly greater in the case before us than in cases involving

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3/ (Footnote Continued from Previous Page)

collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter."

closing the door to litigation to foreign corporations. See Silver v. Woolf, 694 F.2d at 12. The majority of the consumer debts that Allied seeks to collect from Massachusetts debtors arose from consumer transactions occurring in Massachusetts and the effect of Allied's collection practices on Massachusetts debtors will be entirely local. See id.

We shall return to a similar analysis of the licensing and local office requirements in the third section of this opinion, when we discuss the balancing test employed by the Supreme Court of the United States in deciding certain commerce clause

cases. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The per se invalidity cases may fairly be analyzed as extreme cases in which the burden on commerce is substantial and undue in relation to the asserted State interest in regulation. See Aldens, Inc. v. La Follette, 552 F.2d at 752.

2. Discriminatory Effect. Allied argues that, if the licensing and local office requirements are not per se invalid when applied to an interstate trader, they nevertheless impose an unequal burden on out-of-State collection agencies as compared to Massachusetts-based collection agencies. This argument is

expressed in large measure against the local office requirement, and correctly so because there is no significant basis for contending that the license requirement has a discriminatorily uneven effect on out-of-State collection agencies as against in-State agencies. Here, the claim is that the requirement that an out-of-State collection agency establish a second office, and accordingly, it is said, incur a burden not shared by Massachusetts agencies, discriminates in favor of local agencies and against Allied and other out-of-State agencies.

On its face, the local office requirement has no element of "simple

protectionism" but rather "regulates evenhandedly" (see Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 [1981]), requiring every person who conducts an agency mainly to collect retail accounts against consumer debtors to maintain an office in Massachusetts. Allied's claim is, however, that this requirement in its application involves impermissible economic protectionism, even if undertaken in the pursuit of a clearly legitimate local interest, by "requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." Pike v. Bruce Church, Inc., 397 U.S. at 145. Such a "burden on commerce has been declared to be virtually per se illegal." Id.

In assessing the merits of this contention, we must look to the precise requirements of the local office regulation. The regulation demands only that Allied maintain an office in Massachusetts. 209 Code Mass. Regs. § 18.05. There is no requirement as to its size, to its location in the State, or to the days and hours the office must be open. Although Allied is barred from sharing office space with certain persons (such as practicing attorneys, constables, or law enforcement officers), id., the implication is clear that it may share space with others. All that the office must provide on its premises are "such books and records, or copies thereof,

as will disclose debts and amounts of payments from debtors and remittances made to debtors." 209 Code Mass. Regs. § 18.09, first paragraph. Although the Commonwealth's brief suggests that debtors, as well as regulatory officials, will have access to those records at the Massachusetts office, the regulation does not expressly so provide. There is nothing in the record concerning how the regulation has been applied. On its face, it requires only that Allied need provide a part-time employee or other agent to respond to regulatory inspections on days and at times when the office is open. None of Allied's debt collection activities must be carried on in this State, and any such

requirement would probably be an undue burden on interstate commerce. See Dun & Bradstreet, Inc. v. McEldowney, 564 F. Supp. 257, 264 (D. Idaho 1983). Thus no business operations that could be more efficiently performed in Pennsylvania are required to be performed in Massachusetts. See Pike v. Bruce Church, Inc., 397 U.S. at 145.

Allied has not met its burden of showing that the local office requirement involves the kind of economic protectionism or discrimination that the Supreme Court has held burdens interstate commerce unduly. For such cases, see Minnesota v. Clover Leaf Creamery Co., 449 U.S.

456, 472 (1981), and cases cited. As to the burden of proof, see Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). The local office requirement is imposed only to the extent necessary to permit the commissioner to carry out his regulatory obligations and visits effects equally upon interstate and local business. See Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980). In such a case, a balancing test is appropriate, involving consideration of the practical operation of the local regulation and the narrowness with which it is drawn. Id. at 36-37. We turn to this question.

3. The Balancing Test. Allied argues that, even if the licensing and local office requirements are not per se invalid (see part 1 above) or virtually per se invalid (see part 2 above), the burden imposed on commerce is undue in relation to the supposed local benefits of the licensing and local office requirements. The Supreme Court has defined the general rule that has emerged from its cases as follows: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local

benefits. Huron Cement Co. v. Detroit, 362 U.S. 440, 443 [1960]. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

We have already described the limited burden imposed by the local office requirement and have further noted the even less burdensome licensing requirement. We know from the record that twenty-seven

out-of-State collection agencies are licensed by and maintain local offices in Massachusetts. The test is whether interstate commerce is burdened generally, and not whether the degree of burden on a specific plaintiff is undue. See Exxon Corp. v. Governor of Md., 437 U.S. 117, 127-128 (1978). The assertion that Allied could not economically maintain a Massachusetts office is, therefore, not sufficient, even if true, to prove an undue burden on interstate commerce. Even if Allied's own circumstances were relevant, the record does not sufficiently show that Allied could not afford the costs of licensing and of the limited office it must maintain. Thus the extent of the

burden on interstate commerce has not been shown to be substantial.

Against the asserted burden, we must weigh the nature of the local interest and determine whether there is a less burdensome alternative available. The interest of Massachusetts in the proper conduct of agencies seeking to collect consumer debt is obvious. Congress has recognized States' interest in such matters. See 15 U.S.C. § 1692n (1982); Silver v. Woolf, 538 F. Supp. 881, 889 (D. Conn.), aff'd, 694 F.2d 8 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983); Dun & Bradstreet, Inc. v. McEldowney, 564 F. Supp. 257, 263 (D. Idaho 1983). It is shown by affidavit

that the commissioner has concluded that, in order to protect the citizens of the Commonwealth adequately and to examine the books and records of a licensee, it is necessary that the licensee maintain a Massachusetts office and keep adequate books and records in that office. He has further concluded that it would not be feasible to send examiners throughout the country. The commissioner generally conducts unannounced examinations and believes that examination of books and records submitted by a licensee on request is not practical from an auditing standpoint. Allied makes no argument that a procedure of some sort for examining books and records is

unreasonable. There is no demonstrated alternative method of achieving the commissioner's inspection goals.

We thus conclude that the interest of the Commonwealth in requiring local licensing and in the maintenance of a local office is substantial and that the burden imposed on interstate commerce is not shown to be clearly excessive in relation to the local benefits sought to be obtained. In similar circumstances, a licensing requirement has been upheld. Silver v. Woolf, 694 F.2d 8 (2d Cir. 1982). An in-State office requirement for an out-of-State commercial (not consumer) collection agency was upheld against a

commerce clause challenge in Dun & Bradstreet, Inc. v. McEldowney, 564 F. Supp. 257, 262-264 (D. Idaho 1983). That case also upheld a statutory requirement, as interpreted by the court, that the agency maintain an office open to the public on each business day, operating under a State-licensed manager personally familiar with correspondence and communications involving forum State debtors (id.), burdens not imposed by this Commonwealth.

4. Cumulative Burden. Allied finally argues that the cumulative burden of the requirements of the various States impermissibly burdens interstate commerce. As we have

noted, Congress has sanctioned State regulations stricter than those imposed on collection agencies by Federal law. 15 U.S.C. § 1692n (1982). Allied has not shown, as it must, that the consumer debt collection industry as a whole is unduly burdened by a multitude of State regulations. Exxon Corp. v. Governor of Md., 437 U.S. at 127-128. Moreover, it is not apparent that the various State regulations are inconsistent in an impermissibly burdensome way and, in any event, it is not shown that the Massachusetts licensing and local office requirements (the only regulatory elements challenged in this case) contribute unreasonably to the

collective burden. In short, although in some cases there may be an undue burden on interstate commerce from local regulations inconsistent with the flow of interstate activities (see, e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 [1959]), this record does not show that the aggregate effect of State regulation is prohibitive as to interstate debt collection agencies. See Silver v. Woolf, 694 F.2d 8, 14 (2d Cir. 1982).

5. Conclusion. Judgment shall be entered in the Superior Court declaring that the licensing requirement of G. L. c. 93, § 24 is lawful as applied to the Allied Bond

and Collection Agency and that the requirement of 209 Code Mass. Regs. § 18.05 that the Allied Bond and Collection Agency maintain a business office in the Commonwealth is similarly lawful. We leave it to that court to determine (a) the time within which Allied Bond and Collection Agency must comply with the law or cease collection activities with respect to Massachusetts debtors and (b) the question whether an injunction should issue.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court For
The Commonwealth,

At Boston, April 18, 1985

In THE CASE No. SJC-3666

COMMONWEALTH

vs.

ALLIED BOND AND COLLECTION AGENCY

pending in the Superior Court Department of the "Trial" Court for the County of Suffolk No. 20536.

Ordered, that the following entry be made in the docket; viz., -

Judgment shall be entered in the Superior Court in accordance with the opinion.

By The Court,

[illegible], Clerk

[illegible]

See opinion on file.

SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH

ROOM 1412 COURT HOUSE

BOSTON, MASSACHUSETTS

(617) 725-8055

JEAN M. KENNETT
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

May 31, 1985

Robert S Brintz, Esq.
Nutter, McClennen & Fish
600 Atlantic Avenue
Boston, Massacnusetts 02210

Re: Commonwealth vs. Allied Bond and Collection Agency Supreme Judicial Court No. SJC-3666

Dear Mr. Brintz:

Your Motion To Extend Time for Filing Petition For Rehearing is allowed; your Petition For Rehearing has been considered by the court and is denied.

Very truly yours,

Dolores G. Dupre
for Jean M. Kennett, Clerk

c.c.: Steven E. Kramer, Asst. Atty. Gen.
Richard C. Allen, Asst. Atty. Gen.
Office of the Attorney General
Consumer Protection Division
1 Ashburton Place, Boston 02108

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

No. 3666

COMMONWEALTH OF MASSACHUSETTS
Plaintiff-Appellant

v.

ALLIED BOND AND COLLECTION AGENCY
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Allied Bond And Collection Agency ("Allied") hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, declaring the constitutionality of

Mass. Gen. Laws. Ch. 93, § 24, and the regulations promulgated thereunder. The Supreme Judicial Court's Order was entered on April 18, 1985. The Court denied Allied's Petition For Rehearing on May 31, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

ALLIED BOND AND
COLLECTION AGENCY
By its Attorneys,

Robert S Brintz
Linda J. Kline
NUTTER, McCLENNEN & FISH
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210

Dated: August 23, 1985

CERTIFICATE OF SERVICE

I, Robert S Brintz, hereby certify that I have served the attached NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon the plaintiff, Commonwealth of Massachusetts, by mailing a copy of same postate prepaid, to Steven E. Kramer, Esq. at the Consumer Protection Division, Public Protection Bureau, John W. McCormack State Office Building, One Ashburton Place, Boston, MA 02108, this 23rd day of August, 1985.

Robert S Brintz

Massachusetts General Laws, ch. 93, § 24:

> No person not being an attorney at law authorized to practice in the commonwealth, a bank as defined in chapter one hundred and sixty-seven, a national banking association having its main office in the commonwealth, or a person whose usual business is not that of a collection agency, who acts as agent for such bank or national banking association for the purpose of collecting any accounts, bills or other indebtedness which arise from such person's usual business, or an agent or independent contractor employed for the purpose of collecting charges or bills owed by a tenant to a landlord or owed by a customer to a corporation subject to the supervision of the department of public utilities or the division of insurance in so far as said person collects charges or bills only for such landlord or supervised corporations, shall directly or indirectly conduct a collection agency, or engage in the commonwealth in the business of collecting or receiving payment for others of any account, bill or other indebtedness, or engage in the commonwealth in soliciting the right to collect or receive payment for another of any account, bill or other

indebtedness, or advertise for or solicit in print the right to collect or receive payment for another of any account, bill or other indebtedness without first obtaining from the commissioner of banks a license to carry on said business, nor unless such person or the person for whom he or it may be acting as agent has on file with the state treasurer a good and sufficient bond. The commissioner may from time to time establish such regulations pertaining to the conduct of the business as he may deem necessary.

Code of Massachusetts Regulations, § 18.05:

> A collection agency shall not share quarters or office space with an attorney actively engaged in the practice of law, constable, private detective, regular or special police officer or any other law enforcement officer. A collection agency engaged mainly or preponderantly in the collection of retail accounts against consumer debtors shall maintain an office in the Commonwealth. No change in the location of such office in Massachusetts shall take place without written approval of the Commissioner, but such approval shall be deemed granted if no objection is made by the Commissioner within 30 days after written notification of intended

change of location of office. Where no office of a licensee is required to be maintained in Massachusetts, if there is any change in the location of that licensee's office outside the Commonwealth, notice thereof shall be given to the Commissioner forthwith.

> A collection agency engaged mainly or preponderantly in the collecting of retail accounts against consumer debtors shall file with the Commissioner a schedule of days and hours the office will be open. Any change in such schedule shall be reported to the Commissioner at least 5 days before such change shall become effective.

Code of Massachusetts Regulations, § 18.08:

> A collection agency shall annually on or before March 1 submit to the Commissioner a financial statement under oath for examination by the Commissioner, so that he may determine whether the collection agency is financially responsible to carry on the collection agency.
>
> The collection agency shall, upon request by the Commissioner, submit information,
>
> (a) regarding total income from its collection endeavors, and

(b) information from which the Commissioner can conclude whether or not the collection agency is engaged mainly or preponderantly in the collection of retail accounts against consumer debtors.

Code of Massachusetts Regulations, § 18.09:

> The Commissioner shall require the collection agency to keep books and records, and upon reasonable notice to the collection agency to produce such records, as will enable the Commissioner to determine whether the provisions of law and regulations are being complied with. However, a collection agency engaged mainly or preponderantly in the collection of retail accounts against consumer debtors shall maintain on the licensed premises such books and records, or copies thereof, as will disclose debts and amounts of payments from debtors and remittances made to creditors.
>
> Every such collection agency shall preserve the records of final entry used in such business for a period of 2 years after final remittance is made on any account placed with the collection agency for collection or after any

account has been returned to the creditor on which one or more payments have been made. Books and records shall conform to generally accepted accounting practices.

Irrespective of any statutory demand from a creditor, an agency shall account and remit to a creditor all monies collected and due the creditor within 30 days after the last day of each month in which collections are made, unless the creditor, by a specific letter, not by signing a contract authorizes otherwise in writing. Such accounting shall be in such form as may be retained by a creditor and not on or part of a check or draft that must be cashed or collected.

FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 85-522

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ALLIED BOND AND COLLECTION AGENCY,
Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee

Motion To Dismiss The Appellant's Appeal
Or To Affirm The Judgment Of The Supreme
Judicial Court Of Massachusetts

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

DWIGHT GOLANN
ASSISTANT ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MA 02108
(617) 727-4878
COUNSEL OF RECORD

STEVEN E. KRAMER
ASSISTANT ATTORNEY GENERAL

RICHARD C. ALLEN
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR APPELLEE

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QUESTION PRESENTED

Whether this Court should review a state court decision that the commerce clause does not prohibit Massachusetts from applying its debt collection agency licensing requirements to an out-of-state collection agency operating in the state, when Congress has expressly recognized the continuing validity of state debt collection laws, and the Massachusetts requirements are even-handed measures which achieve a valid state purpose with a minimal burden on interstate commerce.

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MOTION TO DISMISS THE APPELLANT'S APPEAL OR TO AFFIRM THE JUDGMENT OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Pursuant to Rule 16 of this Court, the Commonwealth of Massachusetts moves that this appeal be dismissed or that the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts ("SJC") be affirmed on the grounds that the SJC's decision is plainly correct and the question presented by the jurisdictional statement is not so substantial as to warrant plenary review.

STATEMENT OF THE CASE

1. Massachusetts utilizes a comprehensive system to regulate debt collection businesses engaged in the collection of debts from persons within the state. Mass. G.L. c. 93 §§24-28 and 209 Code Mass. Reg. 18.00 et seq. All debt

collection agencies must qualify for and obtain a license in order to do business in the state. Mass. G.L. c. 93, §§24-24A. The license may subsequently be revoked if the collection agency violates regulatory requirements. Mass. G.L. c. 93, §24C.

The Massachusetts licensing authority, the Commissioner of Banks ("the Commissioner") requires applicants to furnish financial statements and references and determines the applicant's reputation, integrity, and financial condition. Mass. G.L. c. 93 §24B and 209 Code Mass. Reg. 18.04. The collection agency must post a $10,000 bond to insure that the agency will turn over to creditors the proceeds collected. Mass. G.L. c. 93, §§24, 25, and 26. Each collection agency is required to submit an annual report and financial statement to

the Commissioner. G.L. c. 93, §§24B and 24D and 209 Code Mass. Reg. 18.08.

All debt collection agencies are required to account to each creditor for all proceeds collected, Mass. G.L. c. 93, §28 and 209 Code Mass. Reg. 18.09, and are prohibited from commingling money collected for creditors with the collection agency's own funds. 209 Code Mass. Reg. 18.10. The Commissioner's regulations prohibit a number of abusive collection practices, 209 Code Mass. Reg. 18.07 and 18.11 et seq., and require written notice by the collection agency to the debtor in certain circumstances. 209 Code Mass. Reg. 18.15(i) and 18.19.

Those collection agencies which engage mainly or preponderantly in the collection of retail accounts against consumer debtors are required to main-

tain an office in the Commonwealth. 209 Code Mass. Reg. 18.05. Such "consumer collection agencies" must maintain in this office a copy of books and records disclosing debts of Massachusetts debtors, amounts of payments by such debtors, and remittances made to creditors in relation to such debts. 209 Code Mass. Reg. 18.09. The law requires that the Commissioner of Banks have free access to these books and records, Mass. G.L. c. 93, §24C, and provides that debtors may come to the office to inspect and copy papers and accounts relating to the debt being collected. 209 Code Mass. Reg. 18.20.[1/]

1/ Section 18.20 of the Massachusetts regulation provides in part:

(footnote continued)

2. Debt collection from consumer debtors is also regulated by the federal Fair Debt Collection Practices Act. 15 U.S.C. §§1692-1692o. That statute, however, does not preempt state oversight of debt collection operations. On the contrary, Congress expressly provided that state laws may afford protection to consumers which is as great as, or greater than, the protection provided by the

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(footnote continued)

> It shall constitute an unfair or deceptive act or practice for a collection agency to fail to allow a debtor or an attorney for a debtor to inspect and copy the following materials regarding a debt during normal business hours of the collection agency and upon notice given to such collection agency not less than five business days preceding the scheduled inspection. . . .

federal statute. 15 U.S.C. §1692n.[2/]

3. The appellant Allied Bond and Collection Agency ("Allied") does extensive business in Massachusetts,[3/]

2/ Section 1692n provides as follows:

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

3/ In the year 1979, for example, Allied attempted to collect 3,558 accounts from debtors residing in Massachusetts, representing a total value of $1,020,693. A preponderance of these accounts involved consumer debtors residing in Massachusetts. [A-33, para. 12, 13 (Statement of Agreed Facts)].

yet it has refused to seek a Massachusetts license or otherwise comply with the Massachusetts requirements. [A-32, para. 8 (Statement of Agreed Facts)]. On the other hand, as of early 1984, there were 167 licensed collection agencies operating in Massachusetts in compliance with the state's requirements. Twenty-seven of these agencies had home offices outside the state, but unlike Allied, all 27 had complied with the Massachusetts licensing requirements, including the requirement of a local office. [A-10 (Affidavit of Alfred P. Quirk, Supervisor of Loan Agencies)].

4. The Attorney General brought this action against Allied in 1977, seeking to enjoin the operation of the company's business in the Commonwealth until it had obtained a license and complied with the

other statutory and regulatory requirements. After filing cross motions for summary judgment, the parties filed a joint petition for direct appellate review by the SJC.

On April 18, 1985, the SJC held that the Massachusetts statutory and regulatory requirements could be applied to Allied without violating the commerce clause of the United States Constitution. The court rejected each of Allied's alternative arguments, advanced again before this Court, that the Commonwealth's licensing and local record keeping requirements impermissibly burden interstate commerce.

Allied subsequently filed a petition for rehearing with the SJC. The petition was denied on May 29, 1985. Allied now appeals from the state court decision.

ARGUMENT

Allied challenges the following Massachusetts requirements for debt collection agencies doing business in the state:

> (1) all collection agencies must qualify for and obtain a license in order to do business in the state (Mass. G.L. c. 93, §§24, 24A);
>
> (2) all collection agencies must submit annual reports and financial statements to the Commissioner (Mass. G.L. c. 93, §§24B and 24D and 209 Code Mass. Reg. 18.08);
>
> (3) all consumer collection agencies must maintain an office in the Commonwealth where copies of records relating to Massachusetts debts shall be kept and made available for inspection by creditors, debtors, and the Commissioner of Banks (209 Code Mass. Reg. 18.05, 18.09 and 18.20).4/

4/ Although not mentioned by Allied in its Question Presented (Jurisdictional Statement, page (i)), Allied also appears to challenge the requirement of a $10,000 bond. See Jurisdictional Statement, pages 13 and 54.

Allied's appeal does not raise issues of federal significance that warrant plenary review by this Court.

I. Allied's Appeal Raises No Substantial Question.

There is no special national interest in the matters at issue in this case. The Massachusetts requirements do not interfere with the national interest in the free movement of money, credit, goods and services. Congress has specifically stated that a uniform national rule for the regulation of debt collection agencies is not required and that states may impose requirements which afford consumers greater protection than provided by federal law. 15 U.S.C. §1692n.

With a minimal, even-handed effect on interstate commerce, the Massachusetts requirements address traditional matters

of local concern.[5/] The requirements further an ongoing, neutral system of oversight by preventing the use of abusive collection practices and assuring that collection businesses are financially sound. They guarantee access to collection agency records by the Commissioner and consumers, and promote accurate accounting by collection agencies of debts, payments by debtors, and remittances to creditors. The measures apply equally to in-state and out-of-state firms, and are imposed only to the extent necessary to carry out the state's regulatory purpose.

There is no need for this Court to make a statement on the issues raised by Allied. The SJC's decision fairly

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5/ The Massachusetts bond requirement, for example, was first enacted in 1910. Mass. St. 1910, c. 656.

balanced the interests of the parties, and it is in accord with the settled state of the law.

For example, in a series of related decisions, four Circuit Courts have upheld state regulatory measures against commerce clause challenges after considering arguments strikingly similar to those raised in the present case. Aldens, Inc. v. Miller, 466 F. Supp. 379, 382-383 (S.D. Iowa 1979), aff'd, 610 F.2d 538 (8th Cir. 1979), cert. denied, 446 U.S. 919 (1980); Aldens, Inc. v. Ryan, 571 F.2d 1159, 1162 (10th Cir. 1978), cert. denied, 439 U.S. 860 (1978); Aldens, Inc. v. LaFollette, 552 F.2d 745, 752-753 (7th Cir. 1977), cert. denied, 434 U.S. 880 (1977); Aldens, Inc. v. Packel, 524 F.2d 38, 49-50 (3d Cir. 1975), cert. denied, 425 U.S. 943

(1976).[6] In addition, Allied was recently unsuccessful in a commerce clause challenge to a Connecticut licensing requirement for debt collection agencies. Silver v. Woolf, 694 F.2d 8 (2nd Cir. 1982), cert. denied, 460 U.S. 1070 (1983).[7]

The Circuit Courts in Aldens and Silver carefully applied the relevant precedent from this Court in upholding the applicable state law as a valid

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6/ See also Meierhenry v. Spiegel, Inc., 277 N.W.2d 298 (S.Dak. 1979), appeal dismissed, 444 U.S. 804 (1979), which rejected a similar commerce clause challenge.

7/ Connecticut did not require that Allied maintain records in an office in the state. But see Dun & Bradstreet, Inc. v. McEldowney, 564 F. Supp. 257, 262-263 (D. Idaho 1983), which upheld an in-state office requirement for a collection agency which specialized in commercial, not consumer, accounts.

exercise of state power. No recent decisions have altered the principles followed in those cases and in the Supreme Judicial Court's decision upholding the Massachusetts requirements.

The Massachusetts local office and record keeping requirement, on which Allied focuses much of its challenge, does not require novel or significant legal analysis by this Court. The SJC's decision does not prevent Allied from continuing its daily operation from Pennsylvania, including its telephone and mail contacts and its centralized system of record keeping. Contrast, Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970).

Allied does not contend that compliance with the Massachusetts office and record keeping requirement is inherently impossible; rather, Allied complains that

it will incur an unspecified amount of additional costs which will harm its ability to conduct a profitable business. Allied's claim, however, consists only of argumentative speculation. The record below does not show the amount of these costs nor the impact of such costs on Allied,[8/] and therefore it is not suitable for plenary review of this issue.

Moreover, even if Allied's factual contentions were supported by the record, it has long been held that state regulation of commerce is not invalid merely because it may increase costs. E.g.,

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8/ The only facts in the record relating to Allied's income, expenses, and profits involve its Massachusetts operation in the year 1979. [A-33, para. 13-16 (Agreed Statement of Facts); A-22, 23 para. 24-28 (Affidavit of Herbert R. Silver)]. There are no facts relating to projected costs of the office requirement if Allied were to comply with it.

Toomer v. Witsell, 334 U.S. 385, 410 (1948) (concurring opinion). The commerce clause does not guarantee a profit to each firm in interstate commerce. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-128 (1978).

Finally, Allied argues that because several states impose requirements on collection agencies, Allied should be free to ignore them all. Jurisdictional Statement, pages 52-55.[9/] However,

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9/ Chaos would result from the ruling which Allied requests. A state could apply its otherwise permissible regulatory requirements only to those out-ofstate firms who do business in a small number of other states which have similar requirements. If an out-of-state firm expanded its operations into too many states which had such requirements, or if too many states in which the firm operated chose to add the requirements, all states would be required to cease applying the requirements to the particular firm. Allied does not suggest the minimum number of regulating states which would trigger such immunity. Resolution by the courts would be necessary on a case-by-case basis.

Congress has expressly provided in the Fair Debt Collection Practices Act that the states may regulate debt collection agencies and that such regulation need not be uniform. 15 U.S.C. §1692n.[10/]

Allied asks this Court to protect the firm's "present character as a full-service intrastate [sic] collection agency and the economic efficiencies attendant to its present method of doing business." (Jurisdictional Statement, page 55). Even if an economic market is nationwide, however, it does not follow that the states are without the power to regulate in that market. Exxon Corp. v. Governor of Maryland, 437 U.S. at 128.[11/]

10/ The text of 15 U.S.C. §1692n is set forth above at page 6, footnote 2.

11/ The Court also stated in Exxon:

(footnote continued)

Allied's argument is better left to Congress, for Congress has plenary power over such matters and may, as here, expressly authorize state regulation in the area.

Compliance with the requirements imposed upon Allied by Massachusetts in fact represents the reasonable cost of doing business in a modern economy. A company like Allied, which seeks to do business in all 50 states, must bear the additional costs of such widespread activity. As Congress recognized in the Fair Debt Collection Practices Act, that

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(footnote continued)

> We cannot ... accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market.

437 U.S. at 127.

cost includes complying with applicable state laws.

There is simply no substantial commerce clause issue presented in this case. The Massachusetts requirements are well within the parameters of permissible state regulation. This is not a case which requires plenary review by this Court.

II. The Supreme Judicial Court Properly Rejected Each Of Allied's Arguments Challenging The Constitutionality Of The Massachusetts Requirements.

If this Court were to undertake plenary review, it would find no error in the SJC's decision. Each of Allied's four alternative arguments was properly rejected, as the state court correctly applied controlling principles from the decisions mentioned above and appropriately distinguished the cases cited by

Allied.[12/]

A. A State Is Not "Per Se" Barred From Licensing An Activity Merely Because The Activity Is In Interstate Commerce.

Allied first contends that the Massachusetts requirements are per se invalid because an out-of-state business operating in interstate commerce may not be required to obtain a license before doing business in the state, no matter how legitimate or crucial the state's interest and no matter how reasonable the state's licensing requirement.

Such a contention was firmly rejected by this Court nearly a half century ago, and it is now clear that

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12/ Even if the SJC had erred in the application of settled law to the sparse facts of this case, the issues raised present no strong reason for plenary Supreme Court review. Therefore, the analysis of the merits presented here will be only summary in nature.

the commerce clause does not bar a state from requiring licenses from interstate businesses and imposing reasonable conditions on their interstate commerce transactions in order to effectuate legitimate state policies. See, e.g., California v. Thompson, 313 U.S. 109, 113 (1941); Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, 351-352 (1939). For example, in Robertson v. California, 328 U.S. 440 (1946), the Court concluded:

> [W]e are far beyond the time when, if ever, the word "license" per se was a condemnation of state regulation of interstate business done within the state's borders.

328 U.S. at 458.

The cases relied on by Allied do not require a different result. Allied seeks to avoid the balancing test of Pike v. Bruce Church, Inc. 397 U.S. 137,

142 (1970), by relying on cases involving laws which deny state court access to foreign corporations as a method of coercing compliance with general foreign corporation registration requirements. Allenberg Cotton Co., Inc. v. Pittman, 419 U.S. 20 (1974); Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961); International Textbook Co. v. Pigg, 217 U.S. 91 (1910). These cases, however, do not stand for the "per se" prohibition against licenses urged by Allied.[13/] Rather, they involve burdensome state regulation with minimal local benefit, thereby placing them at the extreme end of the balancing required by Pike v. Bruce Church, Inc. See Aldens,

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13/ Allied's interpretation of Allenberg, the most recent of these cases, was rejected by all four Circuit Courts in the Aldens cases and by the Circuit Court in Silver v. Woolf, discussed above at pages 12-13.

Inc. v. LaFollette, 552 F.2d 745, 753 (7th Cir. 1977).

The requirements challenged by Allied are in direct contrast to those at issue in Allenberg. The Massachusetts requirements effectuate a specific public welfare purpose, and the regulated activity consists of significant, ongoing contacts with Massachusetts by the out-of-state firm. Unlike the interstate cotton and grain markets discussed in Allenberg, debt collection does not receive or require special federal protection. The denial of court access to enforce a valid contract involved in the cases cited by Allied may be a disproportionate sanction, whereas the Massachusetts debt collection requirements do not impose such a "generically undue" burden on interstate commerce. See Aldens, Inc. v.

LaFollette, 552 F.2d 745, 753 (7th Cir. 1977).

B. The Massachusetts Requirements Do Not Unconstitutionally Discriminate Against Non-Massachusetts Firms.

The Massachusetts requirements are neutral on their face and apply equally to in-state and out-of-state collection firms. They are not protectionist measures intended to insulate local collection firms from outside competition, and Allied has offered no evidence of such a purpose.14/

14/ See 209 Code Mass. Reg. 18.01, Purpose of Regulations:

> The purpose of these regulations is to establish standards, by defining unfair or deceptive acts or practices, for the collection of debts from persons within the Commonwealth of Massachusetts by collection agencies and the conduct of the business of collection agencies.

Nonetheless, Allied contends that the office and record keeping requirement is discriminatory in effect, if not intent.[15/] Allied has not met and cannot meet its burden of proof that this requirement is unconstitutionally discriminatory. See, Hughes v.

15/ Allied seeks in its "discriminatory effect" argument (Jurisdictional Statement, pages 31-39) to draw the Court's attention to language in Pike v. Bruce Church, Inc. that it is "virtually per se illegal" for a state to require business operations to be performed in the home state that could more efficiently be performed elsewhere. 397 U.S. at 145. By this argument, like its earlier assertion that the licensing requirements are "per se invalid" under Allenberg Cotton v. Pittman, Allied asks this Court to invalidate the Massachusetts licensing requrirements without considering the balancing test of Pike. Because the "virtually per se" language arose in the Court's application of the balancing test to the facts in Pike, the Commonwealth will address Allied's "virtually per se" argument in its discussion of the balancing test (pages 31-32, below).

Oklahoma, 441 U.S. 322, 336 (1979).[16] Like the other Massachusetts debt collection agency requirements, the office and record keeping requirement "regulates evenhandedly," Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981), and does not visit its effects solely on nonlocal businesses. Contrast Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 351 (1977). No extra or special requirements are imposed on out-of-state agencies regarding their office in Massachusetts, and no special

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16/ Even if a facially neutral statute has a discriminatory effect against interstate commerce, it is not necessarily unconstitutional. Rather, if the statute is justified both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake, it will be upheld. Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 353 (1977), citing, inter alia, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

exemptions are granted to local agencies. Contrast Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 676-678 (1980); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 446-447 (1981).

C. The Burden On Interstate Commerce Is Not Excessive In Relation To The Local Benefits.

As with its "discriminatory effect" argument, Allied addresses its "excessive burden" argument to the local office and record keeping requirement. Essentially, Allied complains that compliance will be costly and will harm its ability to conduct a profitable business. As discussed above (pages 14-15), the record contains no evidence of the costs of compliance nor how such costs would substantially harm Allied's business. Allied merely speculates that the costs would be prohibitive. The

silence of the record is critical here, first because Allied failed to sustain its heavy burden of proof, and second because speculative concerns are not a sufficient basis for invalidation of state law under the commerce clause. Moorman Manufacturing Co. v. Bair, 437 U.S. 267, 276, 280 (1978).

Moreover, as also noted earlier, many regulations of commerce have been upheld although they were found to increase costs. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 460, 471-474 (1981); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). The test is whether interstate commerce is burdened generally. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-128 (1978).

Massachusetts merely requires that in-state and out-of-state collection

agencies operating in the state maintain an "office" in Massachusetts where copies will be kept of the company's records relating to collection activity with Massachusetts debtors. There is no minimum office size, staffing or equipment requirement. There is no requirement as to the office's location within the state or as to the days and hours the office must be open. The space and staff for the office may be shared with other businesses.17/

Even if the local office requirement imposes a constitutionally recognizable burden on interstate commerce, Allied will not be able to establish that the burden is "clearly excessive" in

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17/ See 209 Code Mass. Reg. 18.05, which provides that a collection agency may not share quarters with a practicing attorney, constable, private detective, police officer, or other law enforcement officer.

relation to the local interests involved, as required by Pike v. Bruce Church, Inc. The office requirement enables the Commissioner to oversee collection agency activities effectively and promotes collection agency accountability by affording both the Commissioner and consumers access to records relating to Massachusetts debtors.

The alternative methods suggested by Allied are inadequate and would not achieve the Commonwealth's goals. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981). The Fair Debt Collection Practices Act and the state bonding requirement do not provide the local oversight of debt collection activities accomplished by the overall Massachusetts regulatory scheme. The local unannounced inspections are necessary to fulfill the Commissioner's

auditing responsibilities. [A-12, 13 (Affidavit of Robert S. Leadbetter, Deputy Commissioner of Banks)].[18/]

The present case is clearly distinguishable from cases cited by Allied holding that a state requirement is "virtually per se illegal" if it requires business operations to be performed in the home state that could more efficiently be performed elsewhere. See, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Dean Milk Co. v. Madison, 340 U.S. 349 (1951); Toomer v. Witsell, 334 U.S. 385 (1948). The Massachusetts requirements do not force Allied to move its business operations

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18/ By suggesting as an alternative that the Commonwealth conduct inspections in Pennsylvania at Allied's expense, Allied implies that this increased cost would be acceptable but that the cost of the local record keeping requirement would not. Thus, the issue is merely one of degree, not one which is worthy of plenary review.

here or conduct its collection activities in the state. Moreover, Massachusetts' interest in addressing the special problems historically posed by debt collection activities is manifest, while Pike involved only a "tenuous" economic interest which was "minimal at best". Pike v. Bruce Church, Inc., 397 U.S. at 145, 146.

The Massachusetts requirements are necessary to achieve the Commonwealth's objectives in protecting Massachusetts debtors and creditors and are not "clearly excessive" in view of the substantial state interest involved. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473-474 (1981).

D. The Massachusetts Requirements Are Not Unconstitutional Because Of The Cumulative Impact Of The Various Requirements Imposed By The Several States.

Allied's final argument is that Massachusetts may not apply its requirements to Allied because of the cumulative impact of similar requirements in the various states. However, neither the Massachusetts requirements nor the cumulative effect of all state requirements create an effective prohibition or impose an undue burden on interstate debt collection activities. Moreover, to the extent that there is a cumulative effect, it is sanctioned by Congressional enactment, 15 U.S.C. §1692n.

Allied's recitation of the various states' requirements reveals that in fact they are minimal in character, similar from state to state, and not so fundamentally inconsistent as to make it inherently impossible for a collection agency to comply with them simultaneously. The Massachusetts requirements

are not of an idiosyncratic nature which serves to block the flow of commerce.[19/] Thus, the Massachusetts debt collection requirements contrast with the state trucking requirements struck down in the cases relied on by Allied. E.g., Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978).

Allied has simply not shown that the consumer debt collection industry as a whole is unduly burdened by a multitude of State regulations. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-128. In view of Congressional approval of state regulations stricter than those imposed on collection agencies by Federal law and Congress' decision not

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19/ See A-24 to A-26 (Affidavit of Herbert R. Silver) and Allied's brief in the Supreme Judicial Court, pages 43-47.

to mandate national uniformity, 15 U.S.C. §1692n, the SJC properly rejected Allied's cumulative burden argument.

VI. CONCLUSION

For the foregoing reasons, Allied's appeal should be dismissed and the decision of the Supreme Judicial Court should be summarily affirmed.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

DWIGHT GOLANN
ASSISTANT ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MA 02108
(617) 727-4878
COUNSEL OF RECORD

STEVEN E. KRAMER
ASSISTANT ATTORNEY GENERAL

RICHARD C. ALLEN
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR APPELLEE

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OCTOBER TERM, 1985

ALLIED BOND AND COLLECTION AGENCY,
Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF AMICUS CURIAE OF AMERICAN COLLECTORS ASSOCIATION, INC. IN SUPPORT OF APPELLANT, ALLIED BOND AND COLLECTION AGENCY

BASIL J. MEZINES
STEIN, MITCHELL & MEZINES
1800 M Street, N.W.
Washington, D.C. 20036
(202) 737-7777
Counsel for Amicus Curiae American Collectors Association, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-522

ALLIED BOND AND COLLECTION AGENCY,
Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
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BRIEF AMICUS CURIAE OF AMERICAN COLLECTORS ASSOCIATION, INC. IN SUPPORT OF APPELLANT, ALLIED BOND AND COLLECTION AGENCY

INTEREST OF AMICUS

Amicus, the American Collectors Association ("ACA"), is an international organization of approximately 3,100 debt collection services. Members include sole proprietorships, partnerships and corporations, ranging from one-person offices to firms with more than 100 employees. ACA members handle the collection of past-due retail, professional and wholesale accounts receivable for nearly one million credit grantors. The question presented in

this suit, whether Massachusetts (or any state) can, consistent with the negative implications of the commerce clause of the United States Constitution, impose licensing, office, and record keeping requirements on out-of-state debt collection agencies, is of vital importance to ACA members. It has been the consistent position of the ACA that such requirements are unconstitutional and pose a grave threat to the economic vitality of the debt collection industry. The ACA, as the representative of numerous consumer debt collectors, has a unique interest in and perspective on the impact and validity of regulatory schemes such as the one at question in this litigation. This amicus curiae brief is filed with the consent of both parties.

SUMMARY OF ARGUMENT

The ACA supports the Jurisdictional Statement submitted by the appellant Allied Bond & Collection Agency. The ACA believes that the Constitution bars Massachusetts from requiring out-of-state collection agencies to obtain a license to conduct wholly interstate business in Massachusetts. Furthermore, the Massachusetts regulatory requirements merely serve to increase the burden of an already unduly burdensome scheme of inconsistent state regulations of debt collection agencies. Massachusetts has not demonstrated that its regulations further an interest that is sufficient to justify this increased burden on interstate commerce. Finally, less burdensome alternatives are available to Massachusetts which will adequately advance the interest served by its regulatory scheme.

ARGUMENT

The ACA fully supports and adopts the reasoning and arguments set forth by the appellant, Allied Bond & Collection Agency ("Allied") in the Jurisdictional Statement it has submitted to this Court. The Massachusetts Supreme Judicial Court's opinion seriously and substantially deviates from, misconstrues, and misapplies the established precedent of this Court which governs analysis of commerce clause cases. Moreover, the Massachusetts court fails to address adequately the serious question of whether states are constitutionally prohibited from requiring a license from an out-of-state business when that business's only contact with the state is through the channels of interstate commerce. As Allied's Jurisdictional Statement demonstrates, these significant issues alone should persuade this Court to note probable jurisdiction.

Additionally, as Allied's Jurisdictional Statement points out, the Massachusetts court misapprehends the nature of the burden imposed on interstate debt collection agencies by the multitude of state regulatory schemes governing debt collection activities and fails to appreciate the availability of less burdensome alternatives that will adequately meet the meagre interests which Massachusetts has shown are served by its regulatory scheme. These deficiencies constitute an independently sufficient reason why this Court should engage in plenary review of this case and reverse. The ACA, as representative of the debt collection industry as a whole, is uniquely situated to appreciate and underscore these particular errors.

The debt collection industry is comprised of approximately 5,000 full-time, predominantly small business offices. To conduct business interstate, like the appellant Allied, these collection agencies engage in collection activities through the use of interstate phone and mail. *See* Heller, *The issue: licensing of out-of-state agencies*, The

Collector, March 1983, at 10. In recent years, more and more states have sought to regulate the activities of intrastate agencies engaged in interstate debt collection. *Id.* These states have taken numerous non-uniform approaches to regulation, ranging from imposition of a modest fee to the establishment of a bewildering morass of offices, state-administered examinations, resident office managers, record keeping and reporting requirements, and local bank accounts. Mezines, *State licensing—interstate collections*, The Collector, August 1985, at 7. Compliance with this multitude of state-imposed restrictions and requirements imposes a heavy financial burden on agencies collecting debts out-of-state, with a particularly devastating impact on small, local agencies. *Id.* at 6-7. The cumulative burden imposed on interstate commerce demands the attention and action of this Court, which alone can accomplish the required relief.

Moreover, the insignificance of the interest Massachusetts demonstrates is furthered by its regulatory scheme cannot justify adding in any way to the magnitude of the burden imposed by the cumulative impact of these inconsistent regulations on interstate debt collection agencies. *See Silver v. Woolf*, 694 F.2d 8, 14 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1525 (1983) ("[l]ocal interests may be insufficient to justify State legislation which, because it differs from the laws of other states, significantly burdens commerce"); *see also Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). As Allied demonstrates in its Jurisdictional Statement, the only interest clearly served by the Massachusetts office and record keeping requirements is to allow for periodic unannounced inspections of books and records which indicate whether collection agencies have complied with the requirement to remit payments due creditors within the required time. Such an insubstantial and insignificant interest does not justify any incremental in-

crease in the burden already imposed by the various existing regulatory schemes.

Finally, this Court should be aware of the creative alternatives which some states have adopted to replace local office and record keeping requirements. For example, Wisconsin, rather than requiring record retention at an in-state office, allows the collection agency to have inspections at its foreign home office if the agency bears the expense of sending Wisconsin inspectors to its office. Some states will accept access to a collection agency's computer terminals in lieu of the opening of branch offices. Other states create special categories for out-of-state agencies that do not conduct substantial collection activities in the state, exempting them from local office requirements. Mezines, *supra*, at 7. Any one of these alternatives would be a less burdensome means of achieving the interest sought to be advanced by the Massachusetts scheme.

CONCLUSION

For all of the foregoing reasons, Amicus ACA urges this Court to note probable jurisdiction of Allied's appeal and reverse the judgment of the Massachusetts Supreme Judicial Court.

Respectfully submitted,

BASIL J. MEZINES
STEIN, MITCHELL & MEZINES
1800 M Street, N.W.
(202) 737-7777
Counsel for Amicus Curiae American Collectors Association, Inc.